

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA:

LOCAL 13101,

Charging Party,

v.

KENT COUNTY LEVY COURT,

Respondent.

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ULP 14-08-971

Probable Cause Determination

BACKGROUND

The Communications Workers of America, Local 13101¹, (“CWA”) is an employee organization within the meaning of §1302(i) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994;“PERA”). It is the exclusive bargaining representative of non-supervisory production and maintenance employees of the Kent County Wastewater Treatment Facility, within the meaning of §1302 (j) of the PERA. *DOL Case 261*.

Kent County Levy Court (“County”) is a public employer within the meaning of §1302(p) of the PERA.

Kent County and CWA Local 13101 are parties to a current collective bargaining agreement which has a term of January 1, 2009 through December 31, 2014. *Answer, Exhibit 1*.

On or about August 27, 2014, CWA filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”), asserting the County has engaged in conduct in violation of §1307(a)(1) and (a)(5) of the PERA, which state:

1307. Unfair labor practices.

¹ Local 13101 was formerly known as CWA Local 1036/Branch 312.

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (1) Interfere with, restrain or coerce any employee because of the exercise of any right guaranteed under this chapter.
 - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of an appropriate unit, except with respect to a discretionary subject.

Specifically the Charge alleges that “in or about October 1, 2014, and continuing thereafter,” the County unilaterally and arbitrarily sought to install GPS devices in County-owned vehicles without notice to the CWA and without negotiation concerning the impact on bargaining unit employees. CWA asserts the installation of GPS systems in vehicles may result in disciplinary action against bargaining unit employees, which is a mandatory subject of bargaining.

The County filed its Answer to the Charge on or about September 5, 2014. The County asserts that the Charge is premature because it alleges the action complained of occurred on October 1, 2014, a date which had not yet occurred when the Charge was filed on August 27, 2014. The County admits that it has installed GPS devices in Department of Public Works vehicles as part of a pilot program. It asserts that no decision has yet been made as to whether the devices will be permanently installed in any or all County vehicles.

The County denies the installation of GPS devices in County-owned vehicles is a mandatory subject of bargaining, and asserts it is a matter of inherent managerial prerogative under 19 Del.C. §1305, i.e., it constitutes the utilization of technology. It also asserts Article XL of the parties’ collective bargaining agreement, Management Rights, grants the employer “broad authority over its operations, including the right to know where and how County-owned vehicles are being operated.”

The County’s Answer did not include new matter and the pleadings closed upon receipt

of the Answer. This probable cause determination is based upon review of the pleadings.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

- (a) Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
- (b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings; otherwise he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

It is well-established case law that a public employer commits an unfair labor practice by violating its duty to bargain in good faith when it unilaterally alters a term or condition of employment or implements a new condition of employment without first negotiating with the exclusive bargaining representative of the affected employees. This obligation to bargain before making changes extends to working conditions regardless of whether they exist through custom and practice or are expressly and specifically set forth in a collective bargaining agreement. *FOP Lodge 15 v. Dover*, ULP 98-07-238. III PERB 1855, 1860 (1999).

The County states in its Answer that it discussed the purpose of the proposed GPS devices with CWA representatives in labor management meetings, although it asserts it had no contractual obligation to do so. The County states the purpose of installing GPS devices is "... general fleet management (i.e., fuel consumption, routine oil change/maintenance, tire pressure and related safety/mechanical problems), vehicle location, safe driving speed, complaint resolution, etc., as well as the potential utilization of data collected therefrom for investigation and resulting discipline, if warranted." *Answer ¶10.*

The County appended to its Answer the minutes of several CWA Labor/Management Committee meetings which chronicle the discussion between the County and CWA of installation of GPS devices and the purposes of monitoring County-owned vehicles with the devices. The May 13, 2014 minutes include the following summary of the initial discussion:

Mr. Kujala² advised that the County is considering the installation of GPS units in Public Works Department vehicles. He said the County does not need the union's permission to install the devices, but he was providing notice anyway of the intent to do so.

Mr. Westbrook³ said the Union disapproves of GPS devices being installed.

Mr. Wallace⁴ said the devices should be installed on supervisor vehicles as well.

Mr. Kujala said justification for the project's expense was not fully known, so one or more devices will be randomly placed on vehicles and randomly checked to determine speed and location. He offered a trial period lasting up to six months or more and he agreed not to discipline any union members for misconduct gleaned solely from the GPS device. He said however that there would be an earnest conversation if a violation is discovered solely from GPS tracking...*Answer Exhibit 3.*

GPS monitoring was again discussed at the June 10, 2014 Labor/Management Committee

² Mr. Kujala is the County Personnel Director.

³ Mr. Westbrook is CWA Local 13101's Executive Vice President.

⁴ Mr. Wallace is CWA Local 13101's Chief Shop Steward.

meeting, the minutes of which state:

Mr. Hummell⁵ objected to the placement of GPS devices in County vehicles used by union members. He stated that it is a mandatory subject of collective bargaining and he will file an unfair labor practice charge if the County proceeds.

Mr. Kujala disagreed with Mr. Hummell contention [*sic*] and advised that the County would soon install one or more GPS units in Public Works Department vehicles. He said the County does not need the union's permission to install the devices, but last month he had provided notice anyway of the intent to do so. In addition, he said the County waited to proceed until this meeting per the union's request. Mr. Kujala said justification for the project's expense was not yet fully known, so the device(s) will be randomly placed on vehicles and randomly checked to determine speed and location. He said after a period of time the benefits of GPS monitoring will be evaluated before a fully functional system is installed. *Answer, Exhibit 4.*

GPS monitoring was discussed in the July 8, 2014 meeting, and the minutes state:

Mr. Hummell asked if any GPS devices had been installed in County vehicles used by union members. He stated that it is a mandatory subject of collective bargaining and he will file an unfair labor practice charge if the County proceeds.

Mr. Kujala said he did not believe that the GPS device(s) had been installed on any vehicles yet. He said he expected that the device(s) would initially be tested on supervisor vehicles and in the Engineering Division before being randomly installed on Public Works Department vehicles assigned to the wastewater treatment plant.

Mr. Hummell asked when the County would be sitting down at the bargaining table to negotiate the matter.

Mr. Kujala reiterated the County's position that the union's permission is not needed to install the device(s). He said the device(s) would be used to ascertain speed and location and depending on the final product selected, it could be utilized to assist with vehicle maintenance and fuel conservation. *Answer, Exhibit 4.*

The issue was again discussed at the August 12, 2014 Labor/Management Committee meeting, as reflected in the minutes of that meeting:

Mr. Hummell asked Mr. Kujala if he intended to respond to his e-mail sent July 22, 2014 asking when the County will sit down with the union

⁵ Mr. Hummell is CWA Local 13101's President.

at the bargaining table to negotiate the GPS matter.

Mr. Kujala said he did not recall seeing the e-mail upon his return from vacation and he reiterated the County's position that the union's permission is not needed to install the device(s). He said the device(s) would be used to ascertain speed and location, and depending on the final product selected it could be utilized to assist with vehicle maintenance and fuel conservation.

Mr. Hummell asked if a GPS device is currently installed on any vehicles.

Mr. Kujala stated to the best of his knowledge the device is not installed on the vehicles operated by any union member at this time. He said that the GPS device is in the "test" phase and after it is complete, the Public Works Department may be included in a larger project to upgrade the GPS systems currently installed on Public Safety Department vehicles or acquire a system separately. *Answer, Exhibit 4.*

Whether the installation and use of GPS devices on County-owned vehicles operated by bargaining unit employees constitutes a mandatory subject of bargaining raises a question of first impression before the PERB in Delaware. While the County is correct in its assertion that the utilization of technology is a matter reserved to the inherent managerial prerogative of the public employer, it is well-established in case law that discipline is a mandatory subject of bargaining under the Public Employment Relations Act.

PERB has a well-established sequential analysis for determining the bargaining status of issues:

1. Is the subject matter expressly reserved to the exclusive prerogative of the public employer by the PERA or any other law (i.e., is it an illegal subject of bargaining)?
2. Does the subject matter fall within the statutory definition of "terms and conditions of employment" (i.e., does it constitute a mandatory subject of bargaining)?
3. Does the subject matter involve a matter of inherent managerial policy as defined in §1305, Employer Rights (i.e., does it constitute a permissive subject of bargaining)?
4. If the answer to both #2 and #3 are affirmative, a balancing test is applied: Does the impact of the matter on the operations of the public

employer, as a whole, clearly outweigh the direct impact on individual employees? *Woodbridge Education Assn. v. Bd. of Education*, ULP 90-02-048, I PERB 537, 546 (1990).

The pleadings raise legal issues concerning whether the installation of GPS devices in County-owned vehicles which may be used to monitor speed, location, maintenance and fuel conservation of vehicles and/or the impact of the installation of the devices in vehicles operated by bargaining unit employees constitutes a mandatory or permissive subject of bargaining under the PERA.

The minutes appended to the County's Answer clearly identify that the CWA requested on numerous occasions to bargain with respect to the installation and impact of GPS monitoring device(s) in County-owned vehicles operated by bargaining unit members. Those minutes (which were prepared by the County's Personnel Director) also reflect that the County repeatedly denied CWA's request to negotiate. Whether this action violated the County's duty to bargain in good faith and/or interfered with the rights of its employees under the PERA is dependent on a determination that the matter is, in fact, a mandatory subject of bargaining.

Additionally, there is a factual dispute as to whether GPS monitoring devices have actually been installed in vehicles operated by bargaining unit employees. Resolution of this issue requires an evidentiary record be created.

The pleadings are sufficient, when viewed in a light most favorable to the CWA, to support a determination that an unfair labor practice, as alleged, may have occurred.

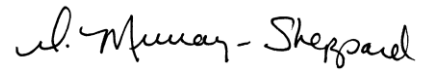
DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish probable cause to believe that an unfair labor practice, as alleged, may have occurred.

WHEREFORE, a hearing will be promptly convened to create a record on which

argument can be made and a determination rendered as to whether the installation and use of GPS monitoring devices in County-owned vehicles operated by bargaining unit employees (and/or the impact of the implementation of a GPS monitoring system) constitutes a mandatory subject of bargaining. If so, did the County violate its duty to bargain in good faith and interfere with the rights of employees represented by CWA Local 13101 by refusing to negotiate with respect to the installation and implementation of a GPS monitoring system.

Date: December 2, 2014



DEBORAH L. MURRAY-SHEPPARD
Executive Director, Delaware PERB